

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Douglas A. Kelley, in his	)	File No. 19-cv-1756
capacity as the Trustee of the	)	(WMW)
BMO Litigation Trust,	)	
	)	
Plaintiff,	)	St. Paul, Minnesota
	)	November 8, 2022
vs.	)	9:47 a.m.
	)	
BMO Harris Bank N.A., as	)	
successor to M&I Marshall and	)	
Ilsley Bank,	)	
	)	
Defendant.	)	

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BEFORE THE HONORABLE WILHELMINA M. WRIGHT  
UNITED STATES DISTRICT COURT JUDGE  
**(JURY TRIAL PROCEEDINGS - VOLUME XVII)**

Proceedings reported by certified court reporter;  
transcript produced with computer.

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I N D E XPAGE

JURY QUESTION  
VERDICT

3820  
3824

**P R O C E E D I N G S**

**IN OPEN COURT**

**(JURY NOT PRESENT)**

THE COURT: So we received a message from the jury this morning. And so on Tuesday, November 8th, at approximately 9:00 a.m. the jury asked:

"Judge Wright, good morning. May we please have transcripts for Ted Martens testimony and Karl Jareks testimony. Please and thanks. The Jury."

And my proposed response to the jury is:

"At the start of the trial the Court provided you with the following preliminary instruction," and then quoting, "'At the end of trial you must make your decision based on what you recall of the evidence. You will not have a written copy of the testimony to refer to. Because of this, you have to pay close attention to the testimony and other evidence as it is presented here in the courtroom. If you wish, however, you may take notes to help you remember what witnesses said.'"

And so that is the answer that I plan to give. Do either of the parties wish to be heard?

MR. MOHEBAN: Yes, Your Honor. Good morning.  
Keith Moheban for BMO Harris Bank.

THE COURT: Good morning.

MR. MOHEBAN: Judge, I think this jury is doing

1        what we want them to do. They are in their third day of  
2        deliberation. They're asking lots of questions. They're  
3        studying the evidence. And their request for the  
4        transcripts is consistent with a jury doing what we would  
5        expect them to do and what we want to encourage them to do.

6                The transcripts are evidence. They're entitled to  
7        consider that. And I think we can take into account this  
8        was a long trial. There were 20-plus witnesses. We went  
9        over 13 days of testimony.

10               So although there are some cases where it's easy  
11        to remember everything, this may not be one of them. Plus,  
12        they had nearly a week off from the last testimony before  
13        they heard closings. So we're talking about testimony they  
14        heard ten days to two weeks ago.

15               So I don't think we want this to be a memory test  
16        for the jury. I know your instruction made clear that they  
17        should take notes. Until they deliberate, they don't always  
18        know what was important. They may remember things  
19        differently.

20               So it's certainly consistent with having the jury  
21        decide things on the evidence to grant the request and give  
22        them the transcripts. And to the extent that that would  
23        require redaction or removal of sidebars, we would be  
24        willing to take the laboring oar of preparing a draft for  
25        that.

1           Alternatively, if the Court determines that giving  
2           the entire transcript is inconsistent with your prior  
3           instruction, your prior instruction does not preclude the  
4           notion of a read-back or providing them targeted portions of  
5           testimony. We don't know exactly what their request is. We  
6           do know they've asked for testimony from both sides, sort of  
7           the counterpart witnesses that were provided by both sides.

8           So an alternative to giving them the entire  
9           transcripts, which we favor, would be to ask them is there  
10          some particular testimony and we could have a read-back of  
11          that portion of the testimony, again, so this isn't a  
12          guessing game for the jury.

13          It's not a memory test and they will then be  
14          allowed to make a decision based on the actual evidence and  
15          not, you know, what are now sort of long-ago memories of  
16          what was said in this courtroom, you know, weeks ago.

17          Thank you.

18          THE COURT: Thank you, Counsel.

19          MR. MARDER: Good morning, Your Honor. David  
20          Marder appearing again on behalf of plaintiff.

21          THE COURT: Good morning, Mr. Marder.

22          MR. MARDER: Your Honor, the instruction that  
23          appears at the bottom of the page and that appeared in the  
24          jury instructions comes directly from the Eighth Circuit's  
25          pattern jury instructions.

1           At the beginning of this trial the parties met and  
2           conferred and both stipulated to this instruction and both  
3           agreed at the outset that the jurors would not have a copy  
4           of the transcript.

5           So based on the fact that this is the Eighth  
6           Circuit's preferred language and based on the fact that the  
7           parties have already agreed and stipulated to this  
8           instruction that the jurors would not be receiving  
9           transcripts, we think that your response, which refers the  
10          jury to the agreed-upon instruction, is appropriate.

11          If Your Honor were inclined to give the  
12          transcripts, which we don't think you should, we certainly  
13          object to any targeted or redacted reading of the  
14          transcripts back to the jury. That would cause the jury to  
15          focus on one portion of the transcript as opposed to all the  
16          others, and we think that would certainly be inappropriate.

17          But setting that aside, Your Honor, I think it's  
18          clear, based upon the stipulation of the parties and the  
19          Eighth Circuit's preference on how to handle this, that the  
20          jury should rely on its notes and its memory rather than on  
21          any particular transcript.

22          THE COURT: Thank you, Counsel. I appreciate your  
23          arguments. It is the ruling of the Court that the  
24          instruction will be given as I have presented to you. It  
25          will be presented to them in writing.

1 LAW CLERK: All rise.

2 THE COURT: Have a good morning.

3 MR. COLLYARD: Thank you.

4 (Recess taken at 9:53 a.m.)

5 \* \* \* \* \*

6 (10:49 a.m.)

7 **IN OPEN COURT**

8 **(JURY NOT PRESENT)**

9 THE COURT: Counsel, please note your appearances.

10 MR. COLLYARD: Good morning, Your Honor. Mike  
11 Collyard on behalf of Plaintiff Douglas Kelley.

12 THE COURT: Good morning, Mr. Collyard.

13 MR. GLEESON: Good morning, Judge. John Gleeson  
14 on behalf of BMO Harris Bank.

15 THE COURT: Thank you. Good morning, Mr. Gleeson.

16 The jury has informed me that they have reached a  
17 verdict. We will retrieve the jury now.

18 (Pause)

19 **IN OPEN COURT**

20 **(JURY PRESENT)**

21 THE COURT: Good morning. Please be seated.

22 Members of the Jury, I understand you have reached  
23 a verdict. Is that correct?

24 THE JURY: Yes.

25 THE COURT: Who was elected as your foreperson?



1 FOREPERSON: Oh, me.

2 THE COURT: Thank you. And, sir, is the verdict a  
3 unanimous verdict?

4 FOREPERSON: Yes.

5 THE COURT: Okay. Would you please provide the  
6 CSO the verdict form.

7 (Document handed to the Court)

8 THE COURT: Thank you.

9 (Pause)

10 THE COURT: I will now read the verdict aloud.  
11 Members of the Jury, please pay close attention. After I  
12 read the verdict, I will poll you and ask you if this is, in  
13 fact, your verdict.

14 We, the jury, in this case, unanimously make these  
15 answers to the following questions:

16 Count I, Minnesota Uniform Fiduciaries Act. Do  
17 you find in favor of plaintiff and against defendant on  
18 Count I, which alleges a violation of the Minnesota Uniform  
19 Fiduciaries Act? And the answer is no.

20 Count II. Do you find in favor of plaintiff and  
21 against defendant on Count II, which alleges breach of  
22 fiduciary duty? The answer: No.

23 Count III, Aiding and Abetting Fraud. Do you find  
24 in favor of plaintiff and against defendant on Count III,  
25 which alleges aiding and abetting fraud? Answer: No.

1 Count IV, Aiding and Abetting Breach of Fiduciary  
2 Duty. Do you find in favor of plaintiff and against  
3 defendant on Count IV, which alleges aiding and abetting  
4 breach of fiduciary duty? Answer: Yes.

5 Then you're directed to answer Question Numbers 5  
6 and 6 only if you answered "yes" to at least one of the  
7 previous questions. Having done so, if you answer -- I will  
8 read your response.

9 Question Number 5. What sum of money will fairly  
10 and adequately compensate plaintiff for any harm arising  
11 from any claim or claims on which you have found in favor of  
12 plaintiff? The amount: 484,209,716.

13 You may not award punitive damages against the  
14 defendant unless you have first found against the defendant  
15 on at least one of the plaintiff's claims by answering "yes"  
16 to at least one of the first four questions. And you have  
17 provided an answer to Question 5.

18 If you answered no to all of the first four  
19 questions and you have not provided an answer to Question 5,  
20 do not answer Question Number 6.

21 Question Number 6. We assess punitive damages  
22 against defendant in the amount of \$79,533,394.

23 We, the jury, have answered the foregoing  
24 questions as indicated and return the same to the Court as  
25 our verdict.

1 I will now poll the jury, and I will start in the  
2 back row and I will -- you will be juror number 1 and then  
3 we will just go through. Then to the front, and I will  
4 start on the left and we'll go through. Okay?

5 So juror number 1, is this your verdict?

6 JUROR 5: Yes.

7 THE COURT: Juror number 2?

8 JUROR 7: Yes.

9 THE COURT: Juror number 3?

10 JUROR 9: Yes.

11 THE COURT: Juror number 4?

12 JUROR 11: Yes.

13 THE COURT: Juror number 5?

14 JUROR 12: Yes.

15 THE COURT: Juror number 6?

16 JUROR 16: Yes.

17 THE COURT: Juror number 7?

18 JUROR 18: Yes, Your Honor.

19 THE COURT: Juror Number 8.

20 JUROR 25: Yes.

21 THE COURT: Juror number 9?

22 JUROR 27: Yes.

23 THE COURT: Juror number 10?

24 JUROR 28: Yes.

25 THE COURT: And juror number 11?

1 JUROR 10: Yes.

2 THE COURT: Very well. Then, Members of the Jury,  
3 you have performed your responsibilities for this Court and  
4 I want to thank you here in open court for the time, the  
5 care, the attention, and the hard work that you have done  
6 throughout this proceeding.

7 As you well know better than I, the difficulty of  
8 sitting and listening to lots of information, processing  
9 that information without discussion, and then having an  
10 opportunity when going back for your deliberations to  
11 discuss that amount of information in a complex area and  
12 render verdicts as you have done.

13 The jury service that you have performed is one of  
14 the most important types of service that you can perform in  
15 the United States under our Constitution, and you have done  
16 so well and I thank you very much for your service.

17 All rise.

18 MR. MOHEBAN: Your Honor, may I be heard?

19 THE COURT: You may proceed.

20 MR. MOHEBAN: My request --

21 THE COURT: I have not given you permission. You  
22 will have permission outside of the presence of the jury.

23 (Jury excused)

24 **IN OPEN COURT**

25 **(JURY NOT PRESENT)**

1 THE COURT: You may be seated. You wish to be  
2 heard?

3 MR. MOHEBAN: Yes. My request is only that we  
4 have an opportunity to review the verdict form before the  
5 jury is discharged.

6 THE COURT: Okay. You wish to do so right now?

7 MR. MOHEBAN: Yes.

8 THE COURT: You may do so right now.

9 (Counsel review verdict form)

10 MR. MOHEBAN: Thank you.

11 THE COURT: You're welcome.

12 There being no additional matters before the Court  
13 at this time --

14 MR. GLEESON: Judge, one request.

15 THE COURT: You may make your request.

16 MR. GLEESON: There are a couple of matters. We  
17 would like just a -- maybe two weeks to brief before the  
18 entry of judgment. One relates to you may recall in the in  
19 limine -- in the decision on the in limine application  
20 regarding offsets, that the Court said -- and this was  
21 ECF 241, was your decision, page 11 -- to the extent that  
22 there might be reductions based on collateral sources, that  
23 could be the subject of a post-trial application.

24 That issue and the appropriateness of statutory  
25 interest are a couple of issues, and I think that's all, but

1 we would like to -- a little opportunity to think about  
2 whether there's any others.

3 But before the entry of judgment, we would like to  
4 be heard on those two issues at least and we ask two weeks  
5 to have an opportunity to do that. That's our application.

6 MR. MARDER: Your Honor, in the motion in limine  
7 you indicated that the offsets were irrelevant. And then as  
8 an alternative point you said even if offsets weren't  
9 irrelevant, then it's something that could be considered  
10 later, but your primary position in the motion in limine was  
11 that the offsets are irrelevant. That's the position that  
12 has been taken over and over again by both the Bankruptcy  
13 Court and this Court.

14 And to the extent the defendants want to brief  
15 that issue, they can do it 28 days after the entry of  
16 judgment in the context of a motion for a new trial or JMOL,  
17 but in no place did you indicate in your prior decisions  
18 that there would be some kind of post-verdict procedure  
19 whereby we would subtract offsets.

20 That's simply not what's said in the motion in  
21 limine. You said that as an alternative, even if you --  
22 even if these were relevant, they wouldn't be included until  
23 some kind of post-judgment proceeding.

24 So we strongly object to any briefing. There's  
25 simply no need for that.

1           With respect to the two weeks for the prejudgment  
2           interest, I think that's acceptable to us. We think that  
3           the judgment should incorporate prejudgment interest and the  
4           parties probably should brief that so Your Honor could have  
5           the benefit of our views on that.

6           But we strenuously object to any effort to try to  
7           change this verdict that this jury worked so hard to render.

8           Thank you.

9           MR. GLEESON: Just to be clear, Judge, what you  
10          wrote was, "Moreover, to the extent that BMO Harris believes  
11          that it may be entitled to a reduction based on collateral  
12          source payments, the appropriate procedure is for BMO Harris  
13          to seek a reduction after trial," and you cited the *Clark*  
14          *vs. Burlington Northern* case of the Eighth Circuit.

15          So we do think it's an issue that the Court  
16          expressly reserved post trial that influences the content of  
17          the judgment. It's not a post-judgment motion.

18          One other thing, Judge, that I will just point out  
19          is the --

20          THE COURT: Do you know what, Counsel? I am going  
21          to take a break right now. We will take a 15-minute break  
22          and we will resume. I am going to dismiss the jury.

23          (Recess taken at 11:04 a.m.)

24                           \*    \*    \*    \*    \*

25          (11:17 a.m.)

1                                   **IN OPEN COURT**

2                                   **(JURY NOT PRESENT)**

3                   THE COURT:   Please be seated.   Does counsel wish  
4                   to be heard?   You will have five minutes.   I have some other  
5                   matters that need to be addressed.

6                   MR. GLEESON:   Just to complete the last thought, I  
7                   already read to you the Court's invitation or at least the  
8                   Court's acknowledgement that there might be a post-trial  
9                   motion with regard to offsets.   We asked for two weeks to do  
10                  that.   We ask for two weeks to address the appropriateness  
11                  of statutory interest.

12                  And just a reminder to the Court that in addition  
13                  to what we suggest is the need for that work to be done,  
14                  there are equitable defenses you reserved.   We assume you  
15                  need no more briefing on that.

16                  THE COURT:   I need no more briefing on that.  
17                  Thank you, Counsel.

18                  MR. GLEESON:   Okay.   And that's our request, and  
19                  thank you to the Court.

20                  THE COURT:   You're welcome.

21                  MR. MARDER:   Your Honor, just very briefly.   I  
22                  went back to your decision on the motion in limine and it  
23                  just confirmed my memory.   You specifically say, "For these  
24                  reasons, reducing the trustee's damages based on settlements  
25                  the trustee negotiated with third parties would be improper



1 and would not accurately reflect BMO Harris's alleged  
2 liability." You then go on and say, moreover, this is --  
3 the procedure would be to attack this post trial.

4 So it's very clear that that was an alternative  
5 holding and that your primary holding was that offsets are  
6 irrelevant. You then simply said even if they weren't  
7 irrelevant, this isn't the time to address that.

8 Secondly, Your Honor, I'm unaware of any procedure  
9 that would allow them to attack this verdict before  
10 judgment. If they're talking about a remitter motion, we're  
11 looking at Rule 59(e), motion to alter or amend judgment.  
12 If they're looking at a JMOL, that's also post judgment.  
13 There is no procedure that I'm aware of in the federal rules  
14 that allows them to attack this verdict before the judgment  
15 even issues.

16 So we would strongly object to any briefing on  
17 offsets, and we do agree that we should have two weeks to  
18 address the prejudgment interest.

19 THE COURT: Thank you. Okay. We are in recess.

20 (Court adjourned at 11:19 a.m.)

21 \* \* \*

22 I, Lori A. Simpson, certify that the foregoing is a  
23 correct transcript from the record of proceedings in the  
above-entitled matter.

24 Certified by: s/ Lori A. Simpson

25 Lori A. Simpson, RMR-CRR